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In the Supreme Court of the United States

OCTOBER TERM 1976

76-557

~~No. 76-2035~~

GEORGE KHOURY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 23, 1976.

CITATIONS TO OPINION BELOW

The Decision of the Fifth Circuit is found in Appendix A hereof. The Decision is reported in ____ Fed.2 ____.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1976. The jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

WHETHER THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL OR ALTERNATIVELY FOR AN IN-CAMERA INTERVIEW OF THE JURORS AND ALTERNATES WHERE SIX OF THE TWELVE JURORS ADMITTED VIOLATING THE COURTS INSTRUCTIONS REGARDING THE READING OF NEWSPAPERS AND TWO OTHER JURORS ADMITTED DISCUSSING OUTSIDE THE JURY ROOM THE DEATH OF A GOVERNMENT WITNESS WHOSE OBITUARY APPEARED IN THE LOCAL NEWSPAPER DURING THE TRIAL.

STATUTES INVOLVED

The statutory provisions involved herein are Title 26, U.S.C., §7201 and Title 26, U.S.C., §7206(2).

STATEMENT OF THE CASE

The Petitioner-Defendant was indicted on April 15, 1975 by a Grand Jury in Miami, Florida on a 3 count indictment (R.1) charging him in Count I with evasion of his 1968 income taxes in violation of Section 8201 Internal Revenue Code; 26 U.S.C. Section 7201. Counts II and III charged him with aiding and assisting in the preparation of false income tax returns of a Linda Spencer for 1968 and 1969 in violation of Section 7206(2) Internal Revenue Code; 26 U.S.C. 7206(2).

On November 5, 1975 the Defendant and the Government entered into a Pre-Plea Agreement and the Defendant then plead guilty to Count I of the Indictment and on January 5, 1976 the Defendant was sentenced to six (6) months confinement and thirty (30) months non-reporting probation. The confinement to commence on February 2, 1976, Counts II and III were then dismissed.

On January 27, 1976 the Defendant filed a Motion to Set Aside Guilty Plea and Adjudication Thereon, and after a hearing on said Motion, the Court entered its Order granting said Motion on February 4, 1976, and reinstated Counts II and III and ordered that the trial be set forthwith.

The trial commenced on February 25, 1976 and was concluded on March 1, 1976 when the jury after about seven (7) hours of deliberation announced it was hopelessly deadlocked and a Mistrial was declared.

The second trial commenced on March 29, 1976 and on March 31, 1976 at 11:50 A.M. the jury began its de-

liberations. At about 1:30 P.M. the jury announced it had reached a verdict which verdict was received at 2:05 P.M., finding the Defendant guilty as to all three Counts.

The Defendant was then sentenced to serve a six (6) month period of confinement and thirty (30) months probation under the standing conditions of probation.

On April 2, 1976, the Defendant filed a Motion For New Trial and for an In-Camera Interview of the Jurors and Alternates. The Court denied this Motion on April 6, 1976.

On April 8, 1976, the Defendant filed his Notice of Appeal, and on September 23, 1976 the Court of Appeals entered its opinion and affirmed the conviction.

At the close of each day's trial the Court admonished the jury not to read any newspapers or watch any television programs.

The jury began its deliberations at 11:05 A.M. on March 31, 1976, and about 1:30 P.M. announced it had reached a verdict which verdict was received at 2:05 P.M. Between 1:30 P.M. and 2:05 P.M., counsel for the Defendant was advised that a newspaper article had appeared in the Street Edition of the Miami *Herald* dated March 30, 1976, the principal Miami newspaper and which edition was placed for street sale the night of March 29, 1976 and the morning of March 30, 1976. Said article was not only inaccurate but highly prejudicial.

The Court was advised that an article appeared that was prejudicial to the Defendant, but no copy had been

seen by Defendant or his counsel and no copy was available to the Court.

The Court then polled the jury as to whether they had read anything about the case in the newspapers and four (4) jurors answered "no", six (6) answered "yes" and two (2) stated they had heard about the death of Joseph Otchin, a government witness who had testified on March 29, 1976 and whose obituary appeared in tht Miami *Herald* on March 31, 1976. The first juror had originally answered "no" to the question, but later changed his answer to "yes".

When asked specifically about the particular article appearing in the Miami *Herald* street edition of March 30, 1976, all jurors answered "no" as to whether they had read or discussed the article.

The Defendant moved for a Mistrial which Motion was denied by the Court.

On April 2, 1976, the Defendant filed his Motion for a new trial and to interview the jurors and alternates, which Motion was deried on April 6, 1976. Said Motion being based upon the conduct of the Jury or possible misconduct thereof.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the allowance of the Writ are as follows:

The issue involved raises a substantial and important question of Federal Constitutional law as to whether or not the trial court, where the majority of the jurors ad-

mitted violating the courts instructions is required to conduct a full hearing as to what prejudicial effect, if any, the admitted misconduct had upon the verdict.

ARGUMENT

WHETHER THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL OR ALTERNATIVELY FOR AN IN-CAMERA INTERVIEW OF THE JURORS AND ALTERNATES WHERE SIX OF THE TWELVE JURORS ADMITTED VIOLATING THE COURTS INSTRUCTIONS REGARDING THE READING OF NEWSPAPERS AND TWO OTHER JURORS ADMITTED DISCUSSING OUTSIDE THE JURY ROOM THE DEATH OF A GOVERNMENT WITNESS WHOSE OBITUARY APPEARED IN THE LOCAL NEWSPAPER DURING THE TRIAL.

The Court at the evening recess on the first day of trial admonished the jury not to read any newspaper articles about the trial or watch any television news programs and again at the evening recess on March 30, 1976 the Court again advised the jury:

> "However, I do want to give you some special instructions. I can see that won't make any of you mad."
>
> "I need to ask your help. You are instructed tonight, *please to read no newspapers* and to listen to no news programs on the radio or television. If anything shocking happens, I will give you a report in the morning."

> "*But let me please ask you to not read any newspapers*, not to listen to any news programs on the radio or television. I am sure you all understand the importance, as I say, of your verdict being based solely upon what you hear in the courtroom. So, don't discuss the case with anyone, still not even amongst yourselves. Keep an open mind." (Emphasis supplied).

Yet it is clear, that the jurors disobeyed the Court's instructions as six (6) jurors admitted reading the newspapers and two (2) admitted hearing of the death of the government's witness, Joseph Otchin and apparently discussing same.

Since only two (2) jurors heard about the death of the witness it is clear that they must have discussed the case with other persons not on the jury panel in a private conversation. The Fifth Circuit Court in *Richardson v. U.S.A.* 360 F.2d 366 (1966) held that where a juror engaged in a private conversation with a non-juror that prejudice will be assumed in the form of a rebuttable presumption and stated:

> "In failing to conduct" a thorough inquiry . . . to determine exactly what . . . occurred" before overruling the Motion, the trial court abused its discretion *Johnson v. United States*, supra, 207 F.2d at 322."

This Court in *Remmer v. United States*, 1954 347 U.S. 277, 74 S.Ct. 450,98 L.ED. 654 in summarizing the responsibility of the trial judge said:

"In a criminal case, any private communication contact or tampering, directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant . . . The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action ex parte on information such as was received in this case but *should determine the circumstances the impact thereof upon the juror, and whether or not all interested parties permitted to participate.*" (Emphasis added.)

The Defendant in his post-trial motion, requested the Court to interview the jurors individually to determine the circumstances under which the two (2) jurors who heard of the death of Otchin had heard of it detail and to determine as to the entire panel and the alternates the impact of the death and whether or not it was prejudicial.

It should be noted that at the time of the polling of the jury that counsel had not seen the article in the March 30, 1976 issue of the Miami *Herald* and was therefore, in no position to request any questions to the jury with any specificity.

The Court as in *Morgan v United States* 399 F.2d 93, Cert. denied 89 S.Ct. 635, should have (1) conducted a full hearing so as to ferret out the truth; (2) questioned each juror separately and (3) permitted cross-examination of the panel members (and alternates) by counsel.

CONCLUSION

In view of the foregoing, it is respectfully submitted that this Petition be granted.

Respectfully submitted,

SIDNEY A. SOLTZ

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this ____ day of _____, 1976, upon the following person by depositing four copies of same addressed to them in the United States mail with sufficient air mail postage prepaid:

Solicitor General

United States Department of Justice
Washington, D.C. 20530

_____

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES v. KHOURY

UNITED STATES of America,
Plaintiff-Appellee,

v.

George KHOURY,
Defendant-Appellant.

No. 76-2035
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 23, 1976.

The United States District Court for the Southern District of Florida, at Miami, Peter J. Fay, J., found defendant guilty of evading income taxes and assisting in the preparation of false income tax returns, and he appealed. The Court of Appeals, held, inter alia, that in determining whether a newspaper article, published on the evening of the first day of the trial, had been read by any juror, the trial judge did not abuse his discretion by polling the jurors in open court rather than in chambers; and that the judge did not abuse his discretion in conducting an in-court examination, rather than an examination in camera, of those jurors who read the obituary of government witness who died the day after he testified, where the article did not relate to defendant or the issues of the trial.

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409, Part 1.

Affirmed.

1. Criminal Law — 868

In determining whether a newspaper article, published on the evening of the first day of the trial, had been read by any juror, the trial judge did not abuse his discretion by polling the jurors in open court rather than in chambers.

2. Criminal Law — 868

Trial judge did not abuse his discretion in conducting an in-court examination, rather than an examination in camera, of those jurors who read the obituary of government witness who died the day after he testified, where the article did not relate to defendant or the issues of the trial.

3. Criminal Law — 855(8)

Prejudicial private communications between jurors and third parties are prohibited.

4. Criminal Law — 855(8)

Affirmative proof must be introduced by the harmlessness of private communications outside the jury room.

5. Criminal Law — 855(1)

Granting of a mistrial for jury misconduct is largely within the discretion of the trial judge, and this discretion extends to the type of investigation required.

6. Criminal Law — 868

Trial judge did not abuse his discretion in refusing to inquire further when he found that two jurors had heard only about the death of a government witness on the day he testified, where defense counsel, while he requested a mistrial, did not ask the judge to inquire further into the circumstances concerning the jurors hearing about the death.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, GEE and TJOFLAT, Circuit Judges.

PER CURIAM:

Khoury, the defendant-appellant, was convicted of evasion of income taxes and of assisting in the preparation of false income tax returns. His first trial on these charges resulted in a mistrial when the jury could not reach a verdict after seven hours of deliberation. In a second trial, however, the jury returned a guilty verdict after meeting for one and a half hours. Khoury appealed his conviction when the district court refused to conduct an in camera interview of the jurors on the question of jury misconduct. We affirm.

[1] First, Khoury contends that in camera interviews should have been conducted to determine whether any juror read a newspaper article about the case. The article, published on the evening of the first day of the trial, stated that the defendant had entered and subse-

quently had withdrawn a guilty plea to the charges. After hearing of the article, the district court judge polled the jurors in open court and found that none had read it. The trial judge did not abuse his discretion by conducting the poll in open court rather than in his chambers. United States v. Sutherland, 5 Cir. 1972, 463 F.2d 641, cert. denied, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668. Because no juror read the article, its publication could not have prejudiced the defendant. Id.; United States v. Rickert, 5 Cir. 1972, 459 F.2d 352; Palmer v. United States, 5 Cir. 1964, 340 F.2d 48, cert. denied, 1965, 382 U.S. 903, 86 S.Ct. 238, 15 L.Ed.2d 156.

[2] Second, Khoury asserts that the district court should have interrogated the jurors in camera regarding the effect of the death of one of the government's witnesses the day after he testified. A poll of the jury in court revealed that six jurors had read the obituary of the witness and two had heard about his death. The obituary was one indirectly related to the trial. Consequently, the trial judge had the discretion to conduct an in-court examination of those jurors who read the obituary. As we held in United States v. Schrimsher, 5 Cir. 1974, 493 F.2d 848, 854:

> Every claim of jury prejudice because of a newspaper article's appearing during a trial must turn on its own facts. . . . The safer practice in situations involving possible prejudice from newspaper articles or other sources is to interrogate each juror separately and out of presence of the other jurors. However, the procedure used here was not prejudicial error under the particular circumstances of this case. The article did not relate directly to Schrimsher, and

> was not suggestive in any way upon the question of his guilt or innocence.

Likewise in the instant case, the article did not relate to Khoury or the issues of the trial.

Third, the defendant raises a slightly different issue with regard to the two jurors who heard about the death of the witness. Although the record does not indicate the origin of the information about the death, the defendant infers that the two jurors must have discussed it with persons not on the jury. Khoury then argues that such a private conversation must be investigated thoroughly because it raises a rebuttable presumption of prejudice. Richardson v. United States, 5 Cir. 1966, 360 F.2d 366, 369.

[3-6] This Court prohibits prejudicial private communications between jurors and third parties, and we have required affirmative proof of the harmlessness of private communications outside the jury room. Id.; Johnson v. United States, 5 Cir. 1953, 207 F.2d 314, 322; see Morgan v. United States, 5 Cir. 1968, 399 F.2d 93, 97. As in all jury misconduct cases, however, we have also recognized that the granting of a mistrial is largely within the discretion of the trial judge. Tillman v. United States, 5 Cir. 1969, 406 F.2d 930, 937; Wiltsey v. United States, 4 Cir. 1955, 222 F.2d 600, 601. This discretion extends to the type of investigation required. Tillman v. United States, 406 F.2d at 938. In Tillman, the poll of the jury in open court revealed that no juror had participated in the private conversation under investigation. Consequently, the trial judge did not abuse his discretion by refusing to investigate the matter further. In this case the trial judge

refused to inquire further when he found that the two jurors had heard only about the death of a witness. Although the defense attorney requested a mistrial, he did not ask the trial judge to inquire further into the circumstances of the jurors' hearing about the death. Because the subject matter is so tenuously related to the case, we cannot say that the trial judge abused his discretion.

AFFIRMED.

Supreme Court, U. S.
FILED
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OCTOBER TERM, 1976

GEORGE KHOURY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-557

GEORGE KHOURY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of income tax evasion and of aiding and assisting in the preparation of two false income tax returns for a third party, in violation of 26 U.S.C. 7201 and 7206(2). The court sentenced him to six months in prison and 30 months' probation (Pet. 4).

1. Petitioner first argues (Pet. 4, 5, 8) that he may have been prejudiced by an article appearing in the *Miami Herald* during the trial. However, after the verdict the district court questioned each juror separately whether he had read this article, or whether anyone had discussed it with him, and each juror responded in the negative (Tr. 402-403). The court of appeals therefore correctly concluded (Pet. App. 4) that no prejudice could have resulted.

2. Petitioner further contends (Pet. 5-7) that the district court should have conducted a full hearing, presumably *in camera*, as to what prejudicial effect, if any, resulted from the fact that six jurors did read of the death of one of the government's witnesses the day after he had testified. However, since the obituary that they read "did not relate to [petitioner] or the issues of the trial" (Pet. App. 5) and "was not suggestive in any way upon the question of his guilt or innocence" (*ibid.*; quoting from *United States* v. *Schrimsher*, 493 F. 2d 848, 854 (C.A. 5)), it was sufficient to conduct a poll of the jury, in open court after the verdict, to determine whether the reading of the obituary had affected any of the jurors' votes. The district court conducted such a poll and no prejudice was revealed (Pet. App. 4).

3. Finally, petitioner argues (Pet. 7-9) that because two jurors admitted that they heard about the death of the witness, they must have discussed the case with persons not on the jury, thereby creating a rebuttable presumption of prejudice that called for a full investigation. But the court of appeals answered this argument in the following language, upon which we rely (Pet. App. 5-6):

> This Court prohibits prejudicial private communications between jurors and third parties, and we have required affirmative proof of the harmlessness of private communications outside the jury room. * * * As in all jury misconduct cases, however, we have also recognized that the granting of a mistrial is largely within the discretion of the trial judge.* * * This discretion extends to the type of investigation required. Tillman v. United States, 406 F. 2d at 938. In Tillman, the poll of the jury in open court revealed that no juror had participated in the

> private conversation under investigation. Consequently, the trial judge did not abuse his discretion by refusing to investigate the matter further. In this case the trial judge refused to inquire further when he found that the two jurors had heard only about the death of a witness. Although the defense attorney requested a mistrial, he did not ask the trial judge to inquire further into the circumstances of the jurors' hearing about the death. Because the subject matter is so tenuously related to the case, we cannot say that the trial judge abused his discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

DOJ-1976-12